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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 431

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ATLANTA METALLIC CASKET COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 14, 1949, which denied the petition of the Board for enforcement of its order against Atlanta Metallic Casket Company.

OPINIONS BELOW

The opinion of the court of appeals (R. 80) is reported at 173 F. 2d 758. The findings of fact, conclusions of law and order of the Board (R. 33-69) are reported at 75 N. L. R. B. 208.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1949 (R. 81). The Board's petition for rehearing (R. 82-91) was denied on May 30, 1949 (R. 93). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 94). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there is substantial evidence to support the Board's findings that the Company discharged one of its employees because of his union activities, in violation of Section 8 (3) of the Act, and otherwise interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them under Section 7 of the Act, in violation of Section 8 (1) of the Act.[1]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*),

[1] Since the court below did not disclose its reasons for refusing to enforce the Board's order we do not know upon what grounds the case was decided. We state the above question, as we believe it was the controlling basis for the decision. However, should there be other questions lurking in the record, we desire to preserve the right to urge our position thereon, as well as to urge that the failure to issue an opinion disclosing the grounds of decision was itself error.

and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 26-30.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, as amended, the Board, on November 17, 1947, issued its findings of fact, conclusions of law and order (R. 33-68) which may be summarized as follows:[2]

A. *The Board's Findings and Conclusions.*—About January 1, 1946, while United Steel Workers of America, CIO, herein called the Union, was engaged in an attempt to organize the Company's employees, Assistant General Foreman Streetman informed one of the Company's old employees, Wilson, that he, Streetman, two of the foremen, and Whitworth, a part-time supervisor, were not supposed to know about the Union's organizing campaign; that they would permit it to "rock along until it got ripe, and then they would pluck it in the bud"; that they had "squashed" it on a previous occasion when the Union had attempted to organize the plant and that "they could squash it again" (R. 42, 45; B. A. 15-16).

By the early part of February, after the Union had achieved substantial success in its organizing campaign (R. 42, 48; B. A. 5, 9-10), the Company

[2] In the following statement, the record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

commenced its efforts to eliminate the Union as it had threatened to do. Anti-union petitions appeared almost simultaneously in all departments of the plant, most of them typed on the Company's old time sheets (R. 47-52; B. A. 17, 34-35, 38-39, 48-50, 51-56, 61-63, 70, 77, 83-84, 86). A majority of them bore the heading "We, the undersigned, do not want a Union" or "We do not want a CIO Union here" (R. 48-49; B. A. 105-118). These petitions were circulated during working hours over a period of three or four days (R. 49; B. A. 35, 48, 56, 63), and at least three of the Company's foremen assisted in their circulation. Thus, Foreman Camp requested one of his subordinates, employee Panell, to circulate one of the petitions for the purpose of "seeing who was against the Union" (R. 46-47; B. A. 34, 37). Panell protested because he feared that he might cause someone to lose his job, whereupon Camp assured him that no such loss of jobs would result and advised him to consult Assistant General Foreman Streetman for more information about the petitions (R. 47; B. A. 34). As Panell concluded his conversation with Foreman Camp, Foreman Elam approached him, handed him a blank sheet of paper and told him to see Streetman for instructions about what to do with the paper (*ibid.*). Panell then sought out Streetman for instructions and the latter explained that "the way they was doing it was going around and getting the names of those that didn't want the Union"

(R. 47; B. A. 34). Panell did not, however, solicit the employees' signatures because Streetman informed him that other men were already going through the factory for that purpose (R. 47; B. A. 35).

An employee, Holcombe, who refused to sign one of the petitions, was approached on the following morning by his foreman, Miles, who had theretofore made known his hostility to the Union,[3] and questioned concerning his union sympathies (R. 51; B. A. 39). When Holcombe expressed himself in favor of unionization, Miles announced that "he didn't want the damn CIO in there" and that "the day it came in was the day he would leave" (*ibid.*).

On February 15, the Company's president, Cannon, summoned the employees of the vault department to the conference room and outlined to them a plan for reducing their working hours from 48 to 40 hours a week while maintaining the same salary levels (R. 46; B. A. 20-21). He requested all employees in favor of the plan to raise their hands in approval (R. 46; B. A. 21). L. C. Kilgore, the Union's organizing chairman (R. 54; B. A. 16,

[3] About January 30, Foreman Miles had approached a union organizer not an employee of the Company as he was distributing leaflets to the employees outside of the plant and asked him in the presence of a number of employees "Why don't you go to work?" (R. 42; B. A. 7-8). When the organizer replied that he had just been mustered out of the Army where he had been working for the United States Government for the last two and a half years, Miles retorted with an obscene reply and characterization of the discharge paper which the organizer had offered to show him (R. 42-43; B. A. 8).

30), did not raise his hand (R. 46; B. A. 21). Acting Foreman Whitworth, under whom Kilgore worked, was sitting beside him and remarked, "Kilgore, you didn't raise your hand, did you?" (*ibid.*). Kilgore replied, "What difference does it make? The majority's going to rule anyway." (*ibid.*). A few days later while at work, Kilgore was approached by Whitworth and questioned about how he felt concerning the Union organizing the plant after having heard President Cannon's plans for the "new deal" (R. 46; B. A. 21-22). Kilgore replied that he did not intend to vote against a union coming in the plant (R. 46; B. A. 22). A few days later, on February 19, 1946, Kilgore was discharged (R. 56-57).

Henry Whitworth, who was responsible for Kilgore's discharge, became acting foreman of the vault department where Kilgore worked when Miles, the regular foreman, became ill on February 10 (R. 34, 44; B. A. 28, 38, 88-93, 100-102). Whitworth was one of the persons mentioned by Assistant General Foreman Streetman as having been responsible for defeating the Union when it attempted to organize the plant upon a previous occasion and who could do it again (*supra,* p. 3). Prior to being put in charge of the vault department, Whitworth had made several inquiries concerning whether certain employees were union members, had attended a union meeting, and had thereafter circulated one of the anti-union peti-

tions (R. 45-46, 50-51; B. A. 6, 39, 43-47, 70, 73, 81-83, 87-88).

Whitworth was well aware of Kilgore's union activities and sympathies (R. 54, 61-62; B. A. 6, 18-19, 22). Kilgore had been elected chairman of the Union's organizing committee at the January 11 union meeting and was present at the next meeting which Whitworth attended (R. 54; B. A. 30, 81.) He made no attempt to conceal his union sympathies, wearing his union button in the plant and soliciting members among fellow employees (R. 54; B. A. 15, 17-18, 22). He had expressed himself to fellow employees as a strong believer in the value of labor organizations (R. 54-55; B. A. 17-18, 22, 31). And as stated *supra*, pp. 5-6, when, during the height of the Union's organizing campaign, the Company announced a plan to decrease hours of work without a reduction in the employees' pay, he had refused to raise his hand in approval; Whitworth had not only commented upon this conduct at the time, but several days later had sought Kilgore out at his work to question him in regard to his position about the continued need for a Union in view of the Company's voluntary proposal to better the employees' working conditions.

About two days later, on February 19, Whitworth came to Kilgore and told him that his team mates on the "break," a stamping or pressing machine on which he worked, had been complaining about him all day and suggested that Kilgore quit his job (R. 55; B. A. 19, 22). Kilgore, however,

refused to quit and was permitted to return to his machine (R. 55; B. A. 22). Later in the day Whitworth called Kilgore aside and told him that the men with whom he worked were going to quit if Kilgore did not quit (R. 55-56; B. A. 22). Kilgore again refused to quit (R. 56; B. A. 23). Whitworth then undertook personally to supervise the work of Kilgore and his three team mates (R. 56; B. A. 29, 72, 94). One of the four vaults which they made while being thus supervised was imperfect (R. 56; B. A. 23, 29). Although there was no showing that Kilgore was responsible for the defect in the vault, Whitworth took Kilgore to the office, removing Kilgore's time card on the way (R. 56; B. A. 23). He reported to the general foreman, "Kilgore here, I don't know what the trouble is. He's always been on time, his work's been satisfactory up to today. Those three men on the * * * big break, has — says they're going to quit if he don't" (R. 56; B. A. 23). Kilgore was then discharged (R. 56-57; B. A. 23).[4] At the hearing, no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged (R. 61). Even Whitworth did not so testify, but contended rather that Kilgore was discharged because he did not perform

[4] The Company made no attempt to explain why, if Kilgore's work on the stamping machine was in fact unsatisfactory, it did not transfer him back to work on the shears where admittedly he had formerly performed his duties satisfactorily and where, at the time of Kilgore's discharge, a vacancy existed (R. 56, 62; B. A. 20, 24, 41).

his work properly (R. 60-61; B. A. 93-94). The evidence does not show that Kilgore's work was of such a character as to warrant his discharge (R. 57-61). Until the day of his discharge, no fault had ever been found with his work and he had never been told of any complaint regarding his work being made by fellow employees (R. 55; B. A. 22, 24, 28, 29, 94).

Under the circumstances, the Board refused to credit Whitworth's testimony regarding the reason for Kilgore's discharge and concluded that the true reason for his discharge was the Company's "desire to rid itself of the Union's most outspoken adherent, and thereby to discourage its employees in their efforts toward union organization" (R. 62). The Board found, therefore, that the company had discharged Kilgore in violation of Section 8 (3) and (1) of the Act.

The Board concluded also that the Company, by the activities of Foremen Camp, Elam and Streetman in attempting to induce employee Panell to circulate one of the anti-Union petitions, and the conduct of Foreman Miles and Acting Foreman Whitworth in questioning employees Holcombe and Kilgore about their positions in regard to the Union, had interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them under Section 7 of the Act, in violation of Section 8 (1) (R. 34-35, 54).

B. *The Board's order and the proceedings in the court below.*—The Board ordered the Company to

cease and desist from engaging in the unfair labor practices found, to reinstate Kilgore with back pay, and to post appropriate notices (R. 35-38). On January 6, 1949, the Board filed in the court below a petition to enforce the Board's order (R. 1-6). The court, on April 14, 1949, without stating the reasons for its action, entered its opinion and judgment denying the Board's petition for enforcement (R. 80-81).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In not holding that the Board's findings are supported by substantial evidence.

2. In denying enforcement of the Board's order.

3. In failing to state its reasons for denying the Board's petition for enforcement.

REASONS FOR GRANTING THE WRIT

1. As the Statement indicates, and as we shall show (*infra*, p. 23), there is absolutely no lawful basis upon which the court below could have reversed the Board in this case. Nevertheless, this is not the type of case which, were it to be considered in isolation, the Board would normally regard as of sufficient public importance to warrant an application for a writ of certiorari to review the refusal of the court below to enforce the Board's order. But this is not an isolated case; the decision below is, rather, symptomatic of a

pattern of denial by the Court of Appeals for the Fifth Circuit of the rights accorded the National Labor Relations Board by Congress. This Court has said that "charges by public agencies constitutionally created—such as the Board—that their duly conferred jurisdiction has been invaded so that their statutory duties cannot be effectively fulfilled, raise questions of high importance." *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 209. And since the Board's complaint here is even broader than the "substantial evidence" question involved in *Waterman*, certiorari is deemed appropriate to review this decision as well as four other judgments of the court below, review of which is sought by petitions filed concurrently with this.

These applications are being made because the Fifth Circuit has denied enforcement of, or modified, Board orders in an inordinately large number of cases which have recently been before that court on petitions for enforcement of Board orders, and because this experience bodes ill for the large number of Board cases now pending in the area over which the court below has jurisdiction. Thus, in none of the seven contested Board orders before that court during the past year has enforcement in full been granted. And the five cases in which petitions for certiorari are being filed will in themselves show that in a substantial proportion of the cases in which the Fifth Circuit has reversed the

Board, the Court's action was plainly unwarranted as a matter of law.

During the two years following the amendment of the Act (August 22, 1947 to August 22, 1949), the Court of Appeals for the Fifth Circuit has enforced in full only three contested Board orders,[5] and has set aside, modified, or remanded Board orders in twelve cases. In five of those twelve cases, including *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 167 F. 2d 662, recently reversed unanimously by this Court in 337 U. S. 217, the Board's order was set aside *in toto*.[6] In six of the cases, the Board's order was enforced as modified,[7] the modifications in all but two instances being serious; the remaining case

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[5] *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647; *The Sturges Company* v. *National Labor Relations Board*, 166 F. 2d 142; *National Labor Relations Board* v. *Whittenberg*, 165 F. 2d 102.

[6] These include three of the cases in which petitions for writs of certiorari are being filed simultaneously herewith, to wit: the instant case, *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, 173 F. 2d 758; *Wilson & Co.* v. *National Labor Relations Board*, 173 F. 2d 979; and *National Labor Relations Board* v. *Massey Gin & Machine Works, Inc.*, 173 F. 2d 758; in each of which enforcement was denied without opinion; and *National Labor Relations Board* v. *Reynolds Corp.*, 168 F. 2d 877.

[7] These are *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212; *National Labor Relations Board* v. *Sewell Mfg. Co.*, 172 F. 2d 459; *National Labor Relations Board* v. *Lovvorn*, 172 F. 2d 293; *National Labor Relations Board* v. *Port Gibson Veneer Co.*, 167 F. 2d 144, certiorari denied, 335 U.S. 819; *National Labor Relations Board* v. *Prigg*, 172 F. 2d 948; and *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, decided July 8, 1949 (24 L.R.R.M. 2281).

was remanded to the Board for the purpose of taking further evidence.[8]

In sharp contrast, during the same two-year period, contested Board orders were enforced in full in other courts of appeals in 38 of the 59 cases before them. A comparative chart showing the disposition of contested Board orders in each of the courts of appeals is set forth below:

	Enforced in Full	Set Aside	Modified	Remanded
1st Circuit	3	.....	.....	1
2nd Circuit	5	.....	.....	.....
3rd Circuit	2	.....	1	.....
4th Circuit	5	2	2	.....
5th Circuit	*3*	*5*	*6*	*1*
6th Circuit	10	5	2	.....
7th Circuit	6	5	.....	.....
8th Circuit	3	.....	.....	.....
9th Circuit	2	.....	.....	.....
10th Circuit	2	1	.....	.....
D. C.	.....	2	.....	.....

In no circuit other than the Fifth has enforcement of a Board order been denied without the court disclosing the reasons which impelled such action on its part. In three cases in which enforcement was denied by the Fifth Circuit during the period here under consideration—this case, and

[8] *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 172 F. 2d 974.

the *Wilson* and *Massey* cases in which concurrent petitions for writs of certiorari are being filed—Board orders were set aside without even a statement of the basis for decision.

Nor has any circuit other than the Fifth denied summary enforcement of a Board order where the respondent had filed no exceptions to the trial examiner's intermediate report and, hence, pursuant to Section 10 (e) of the Act, no issue as to the validity of the Board's order was open on review. Yet, in two of the cases in which the Board is now petitioning this Court for a writ of certiorari,[9] the court below denied enforcement even under those circumstances, and remanded the cases to the Board with directions to consider additional evidence concerning compliance.

As shown by the chart set forth above, during the last two years, a larger volume of Board orders has come before the court below for enforcement than before any other court of appeals except that for the Sixth Circuit. The percentage of such cases in the area over which the Fifth Circuit exercises jurisdiction wherein respondents refuse to comply with Board orders is rapidly increasing. The Litigation Docket for the Board's Division of Law shows that, as of August 31, 1949, 42 of the 129 Board orders which are pending in the Division of

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[9] *National Labor Relations Board* v. *Mexia Textile Mills*, decided June 3, 1949 (unreported) and *National Labor Relations Board* v. *Pool Mfg. Co.*, decided May 13, 1949 (24 L.R.R.M. 2147).

Law for enforcement involve unfair labor practices which occurred within the Fifth Circuit's jurisdiction. This represents 32 percent of all such orders.[10] Moreover, the large volume of unfair labor practice cases now pending in the Board's regional offices and before the Board in Washington in various stages, from the issuance of the complaint to efforts to obtain compliance with Board orders without the necessity of enforcement proceedings in court, indicates that, for a number of years hence, a large volume of cases will continue to come before the Court of Appeals for the Fifth Circuit in enforcement proceedings. Of the 422 cases thus pending, 79, or 19 percent, arose within the Fifth Circuit's territorial jurisdiction. Upon the basis of past experience, it is estimated that this will result in more than one-third of the Board's enforcement litigation during the coming year being handled by the Fifth Circuit, because a much larger percentage of Board cases pending in that territorial jurisdiction seems to result in court litigation than is true in other circuits.

Until the court below handed down its decisions in the five cases in which petitions for writs of certiorari are now being sought, the Board con-

[10] The Litigation Docket shows the following number of Board orders awaiting enforcement in the various circuits as of August 31, 1949: In the First Circuit, 3; Second Circuit, 10; Third Circuit, 8; Fourth Circuit, 5; Fifth Circuit, 42; Sixth Circuit, 26; Seventh Circuit, 5; Eighth Circuit, 4; Ninth Circuit, 16; Tenth Circuit, 6; and District of Columbia, 4.

sidered whether to ask this Court to review each successive adverse decision only in terms of the importance of that particular decision to the administration of the Act and the existence of important conflict between it and decisions of other courts of appeals or this Court. This approach led the Board to apply for a writ of certiorari in only one case within the last two years, i.e., *National Labor Relations Board* v. *Crompton-Highland Mills, supra.*

Now, however, the Board has become convinced that this approach has proven, and will continue to prove, inadequate to the task of securing enforcement of the Act in the court below. This is so in part because in most cases which come before the courts of appeals on petitions for enforcement of Board orders, the sole issue, as in the instant case and the *Wilson* case, is whether the Board's findings of fact are supported by substantial evidence on the record considered as a whole. A resolution of this issue depends upon the particular facts of each case and hence no question of general importance in the administration of the Act is presented. However, where, as here, a court of appeals not only repeatedly rules that the Board's findings are not supported by substantial evidence, but also denies enforcement in whole or in part to a large majority of all Board orders on various other grounds, sometimes, for no stated reason at all, a more generalized approach to the

Board's request that this Court review the rulings of the court below seems warranted.[11]

The Board does not insist that in all cases in which the court below denied enforcement in full of Board orders within the last two years, its action was clearly unwarranted. Neither does the Board contend that in all cases no substantial part of the Board's order has been enforced. Indeed, in at least two of the six cases in which the Board's order was modified, the Board does not consider the court's modification as seriously affecting its orders.[12] But the other four cases involved modi-

[11] The difficulty of enforcing the Act in the Fifth Circuit has been recently demonstrated anew in *National Labor Relations Board* v. *Corsicana Cotton Mills*, decided by the court below on August 16, 1949. In that case, the Board sought to have an employer held in contempt of a previously issued consent decree requiring the employer to bargain with the accredited representative of its employees. The court, although it was "not in any doubt that * * * respondent withheld recognition from the union as bargaining agent, as ordered by our decree, and caused a rupture of the bargaining negotiations," declined to hold the employer in civil contempt because, in the court's view, "such violation was not intended but has resulted from a mistaken view of * * * the law and not from a purpose to violate the law or our decree." This, it appears, is an error of precisely the same nature as that for which the court below was reversed by this Court in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191. Review of the *Corsicana* case, however, is not now being sought, since the court below declined to issue a final adjudication in the contempt proceeding until the parties report to it in November on the then current status of bargaining negotiations.

[12] Thus, in *National Labor Relations Board* v. *Prigg*, 172 F. 2d 948, involving violations of Section 8 (1), (3) and (5) of the Act, the court below sustained all of the Board's findings and enforced the Board's order except those provisions requiring reinstatement and back pay to six discriminatorily discharged employees; the court retained those

fications of varying degrees of seriousness, some practically emasculating the Board's order.[13] The

provisions of the order "for action after further hearings and action by the Board" since the Board, in its decision, had reserved the right to modify such provisions of the order "if made necessary by a change of conditions in the future." And in *National Labor Relations Board* v. *Lovvorn*, 172 F. 2d 293, involving violations of Section 8 (1) and (5) of the Act, the court sustained the Board's findings but amended that part of the order which required the employer to bargain by adding to the Board's bargaining order the following words, "until in appropriate proceedings under Section 9 (c) of the Act, as amended, the employees with the assistance of the Board and without coercion or interference from union or employer, shall have freely designated a new representative or have freely indicated that they no longer desire to be represented by the said union."

[13] Thus, *National Labor Relations Board* v. *Sewell Mfg. Co.*, 172 F. 2d 459, and *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, decided July 8, 1949, 24 L. R. R. M. 2281, each involved Board findings that the employer had violated Section 8 (1) and (3) of the Act. In each case, the court below sustained only those Board findings relating to violations of Section 8 (1) and refused to sustain the more important findings which related to discriminatory discharges, lay-offs, and refusals to reinstate employees, found by the Board to be in violation of Section 8 (3).

In *National Labor Relations Board* v. *Port Gibson Veneer Co.*, 167 F. 2d 144, employer petition for certiorari denied, 335 U. S. 819, involving Board findings that the employer had violated Section 8 (1) and (3) of the Act by interfering with its employees' organizational rights, by discriminatorily refusing to reinstate three of its employees who struck in protest against their employer's unlawful conduct, and by locking out 210 employees, the court refused to sustain the Board's findings and order in regard to the three employees who engaged in a strike but enforced the remainder of the Board's order.

And in *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, involving violations of Section 8 (1) and (3) of the Act, the court below enforced that part of the Board's order requiring the employer to reinstate one of the discriminatorily discharged employees but denied enforcement to that part of its order requiring reinstatement of another employee who, subsequent to his discriminatory discharge, had been given a part-time job by the employer from which he subsequently voluntarily resigned.

Board's complaint is not merely that the court below has imposed modifications of a different sort than those imposed on Board orders in other courts of appeals.[14] The revisory action of the Fifth Circuit

[14] In this group, for the sake of accuracy, we include among those cases classified *supra*, p. 13, as modified, *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C. A. 6), involving the discharge of foremen because of their union activities. The court enforced the affirmative provisions of the Board's order requiring reinstatement and back-pay, but refused to enforce the cease and desist provisions of the order because, subsequent to the Board's order, the Act was amended, removing foremen from the protection of the Act; the Board did not oppose this modification. *National Labor Relations Board* v. *Mylan-Sparta Co., Inc.*, 166 F. 2d 485 (C. A. 6), involved Board findings that the employer had violated Section 8 (1) and (3) of the Act. The court sustained the findings relating to violations of Section 8 (1) and to three employees whose discharges violated Section 8 (3) but refused to sustain the important findings that the employer had discriminatorily discharged four other employees.

In *National Labor Relations Board* v. *Wytheville Knitting Mills*, 175 F. 2d 238 (C. A. 3), involving Board findings that the employer had violated Section 8 (1) and (3) of the Act, the court sustained only that part of the order relating to the Section 8 (1) violation. It refused to sustain that part which required the employer to reinstate with back pay two striking employees with whom the remainder of the employees, both union and non-union, had refused to work because of offensive language used by the two while they were on the picket lines. In *National Labor Relations Board* v. *Stowe Spinning Co.*, 165 F. 2d 609 (C. A. 4), reversed and remanded, 336 U. S. 226, involving Board findings that the employer had violated Section 8 (1) and (3) of the Act, the Court of Appeals for the Fourth Circuit enforced that part of the Board order based on its finding that Section 8 (3) had been violated but denied enforcement of that part of the order involving Board findings that the employer had unlawfully denied the use of a meeting hall for union meetings, in violation of Section 8 (1). In *Peoples Motor Express, Inc.* v. *National Labor Relations Board*, 165 F. 2d 903 (C. A. 4), involving Board findings that the employer had violated Section 8 (1), (3) and (5) of the Act, the court enforced all provisions of the Board's order except that pertaining to one of three employees found by the Board to have been discriminatorily discharged.

differs from that of other reviewing courts not only in its nature but in its frequency.

The Board can see no sound reason why, assuming substantially the same standards of review and approach are applied, one court of appeals should deny enforcement of Board orders in a much greater proportion of cases than other courts of appeals. The same trial examiners who hear cases and make the initial findings of fact and recommendations within the Fifth Circuit's territorial jurisdiction hear cases and make findings and recommendations in cases throughout the country, for the Board assigns cases to its trial examiners in rotation so far as practicable, as it is required to do under Section 11 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001-1011). Moreover, the same Board Members who decide the cases which come before the Court of Appeals for the Fifth Circuit for review likewise decide the cases which come before all the other courts of appeals.

We realize, of course, that statistics in situations such as this are not absolute proof of the conclusion toward which they point. It is conceivable that in the two years following the 1947 amendment of the Act, the Board has happened to commit reversible error in most of the cases coming before the court below for review, while it did not commit reversible error in more than a small number of the similar cases coming before other circuits. But we do not believe that such extraordinary fortuity is the explanation. We believe, rather, that the

court's action results either from its failure to accept, or its erroneous concept of, the statutory scheme for court review of Board orders. An inkling of the approach taken by the court below is afforded by the opinion in *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 213:

> This is another of those dreary reviews of Board proceedings presenting the question not whether the findings of fact made by the Board, as trier of the facts, on evidence presented by the Board, as prosecutor, in support of charges filed by the Board as complainant, have been fairly, impartially, and justly arrived at, but whether they are "supported by substantial evidence on the record considered as a whole." It presents the usual picture of supporting findings arrived at by a process of quite uniformly "crediting" testimony favorable to the charges and as uniformly "discrediting" testimony opposed.

See also, *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, decided July 8, 1949 (24 L. R. R. M. 2281). But the best and, perhaps, the only way to determine the accuracy of the Board's appraisal of the situation is for this Court to review the five cases in which writs of certiorari are now being sought.

These five cases are, we believe, appropriate vehicles for bringing to this Court's attention the special seriousness of the Board's enforcement problems in the court below. In this case and

the *Wilson* case, although the court did not state its reasons for refusing to enforce the Board's orders, there appears to be no issue which would have resulted in setting aside the entire order except whether there is substantial evidence supporting the Board's findings. In the *Massey Gin* case, a number of legal issues which are described in the Board's petition for a writ of certiorari in that case were presented, but the court below stated no reason for denying enforcement of the Board's order and the Board is without knowledge of the grounds upon which the court below acted. In the *Mexia* and *Pool* cases, in which the validity of the Board's orders had not even been contested, the court below granted employer petitions to adduce additional evidence and remanded the cases to the Board to take evidence and report whether there had been compliance with the Board's order and what effect, if any, compliance should have on the request for enforcement. In all of these cases, we contend that the court below clearly committed error.

On February 12, 1940, this Court in *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, admonished the court below not to substitute its own judgment for that of the Board on questions of fact. During the ensuing period a much larger percentage of Board orders received enforcement in that circuit.[15] It seems clear to the

[15] Between the *Waterman* decision on February 12, 1940, and August 22, 1947, the effective date of the amended Act,

Board that the court below once again requires correction by this Court if the statute is to be effectively administered in the large and important area covered by that court's jurisdiction.

2. As shown in the Statement, *supra*, pp. 3-9, the Board's findings of fact are clearly supported by substantial evidence on the record considered as a whole. The Board's order is the uniformly approved remedy for the unfair labor practices found and its appropriateness, if based upon findings supported by substantial evidence, was never in issue. The employer in the court below urged only that the Board's findings were not supported by substantial evidence. We are therefore convinced that the sole issue involved is the substantiality of the evidence. While it is possible, as we suggested in our petition for rehearing below (R. 82-83), that the court below believes that the scope of court review of Board findings has been changed by the amended Act, in this case there is clearly substantial evidence to support the Board's findings under any correct interpretation of the provision of that Act that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive" (Section 10 (e)).[16] The court's un-

---

the court below enforced in full 40 Board orders, denied enforcement of 9, modified 26, and remanded 2.

[16] That the scope of review under the Act, as amended, has not been materially changed, see *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U. S. 217, 220; *Eastern Coal Corp.* v. *National Labor Relations Board*,

explained denial of the Board's petition for enforcement of its order under the circumstances constitutes a serious impediment to the proper functioning of the Act. It has resulted in clear violations of the Act standing uncorrected.

3. We believe that the court below erred in failing to set forth the reasons for its denial of enforcement in the instant case. In the *Massey* case, where the court below likewise failed to disclose its grounds for decision, we are asking that the case be remanded for an explanatory opinion.

However, we urge the Court to take the instant case and decide it now on the merits, rather than remand it for an opinion. Whereas in the *Massey* case, a multiplicity of issues are presented resolution of which would impose an undue burden on this Court, unenlightened, as it is, by an opinion of the court below, the issue in the instant case is a narrow one. That being so, and since a remand in this and the *Wilson* case would be only partly responsive to the needs which have given rise to these unusual applications for certiorari, we deem immediate consideration of the merits by this Court to be of great importance to the effective administration of the Act. Only in that way can the whole problem of enforcement which the Board has encountered in the Fifth Circuit be met.

(C. A. 4), decided June 13, 1949 (24 L. R. R. M. 2210); *National Labor Relations Board* v. *Austin Co.*, 165 F. 2d 592, 595 (C. A. 7); *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 213 (C. A. 5). Cf. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656.

CONCLUSION

For the reasons stated above, we respectfully submit that this petition for a writ of certiorari should be granted, in association with those in the other four cases.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

OCTOBER 1949.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provision of Section 9 (a).

* * * * *

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If

either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript.

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * *

SEC. 10

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 431

NATIONAL LABOR RELATIONS BOARD,
Petitioner

versus

ATLANTA METALLIC CASKET COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF WRIT

M. E. KILPATRICK,
Attorney for Respondent

Of Counsel
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IN THE

SUPREME COURT OF THE UNITED STATES

National Labor Relations Board, *Petitioner*	
vs.	NUMBER 431
Atlanta Metallic Casket Company, *Respondent*	

BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF WRIT

OBJECTIONS TO JURISDICITION AND TO GRANT OF WRIT

Respondent, Atlanta Metallic Casket Company, pursuant to Rule 7, Paragraph 3, and in lieu of a motion to dismiss the petition for certiorari, asserts the following objections to the jurisdiction of this Court, and to the grant of the writ:

(A) This Court is without jurisdiction for the purposes urged by the Labor Board, of admonishing and reprimanding the Judges of the Court of Appeals for the Fifth Circuit with respect to their official conduct in deciding labor cases generally during the past two years, or of "softening up" the said Court in anticipation of many Board cases to be brought before said Court during the next year;

References to Pet. are to the Petition for Certiorari; Tr. to the Transcript, and A. to the Appendix to Respondent's Brief in the Circuit Court of Appeals, which is a part of the Record of this Court.

(B) The charges made by the Board against the Judges of the Court below, in so far as their conduct in deciding the present case is concerned, are without foundation or basis in fact. Indeed, the statements of fact made by the Board in its petition for certiorari herein are in many material respects gross misstatements of the record. Such misstatements were either intentionally made to this Court, or the persons responsible for the filing of the petition did not read the transcript of evidence, the detailed exceptions of Respondent, nor the brief of the Respondent in the Court below;

(C) In the light of the Board's gross misstatements to this Court as to the record in the present case, we believe in the four other cases in which the writ of certiorari is sought, that the Board's attack on similar grounds upon the integrity of the Judges of the Court below with respect to their handling of labor cases during the last two years results either from the Board's *own wilfull failure to accept* or its erroneous concept of its own duties and responsibilities, and an utter failure to observe the fundamental principles of fairness in the handling of cases before it and to deal fairly and accurately with proven facts;

(D) The Supreme Court of the United States is not the proper forum for a determination of the charges made by the Board against the Judges of the Court below, nor of the charges which are herein urged against the Board.

(E) The failure of the Board to notify Respondent or its counsel of intention to seek an extension of time for filing petition for certiorari, and the failure to notify Respondent or its counsel of grant of such extension was such a flagrant abuse and disregard of the spirit of the rules of this Court and of recognized and customary ethics as to require the refusal of grant of writ of certiorari.

(F) As admitted by the Board in its petition for certiorari the instant case does not involve matters of general public interest and moreover the refusal of the Court below to enforce the Board's order was a decision demanded by the evidence as there was no evidence to support the Board's findings.

A. COURT IS WITHOUT JURISDICTION FOR PURPOSES SOUGHT BY LABOR BOARD

The Labor Board admits in its petition that this case is not one of general importance nor one which in itself even warrants the application for the writ of certiorari:

> "A resolution of this issue depends upon the particular facts of each case and hence no question of general importance in the administration of the Act is presented." (Pet. p. 16).

> "Nevertheless, this is not the type of case which, were it to be considered in isolation, the Board would normally regard as of sufficient public importance to warrant an application for a writ of certiorari to review the refusal of the court below to enforce the Board's order." (Pet. p. 10).

The Labor Board, thus acknowledging that its effort to invoke this Court's jurisdiction is principally for a purpose other than the review of the instant case, discloses its real object, namely: to have this Court take to task, admonish and reprimand the Judges of the said Court of Appeals because of their decisions in the labor cases decided by that Court during the last two years, and to "soften up" the said Court of Appeals in preparation for the many pending Board cases which the Board asserts will come before that Court during the next twelve months. Says the Board:

"We believe, rather, that the court's action results either from its failure to accept, or its erroneous concept of, the statutory scheme for court review of Board Orders." (Pet. p. 20-21).

"On February 12, 1940, this Court in *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206, admonished the court below not to substitute its own judgment for that of the Board on questions of fact. During the ensuing period a much larger percentage of Board orders received enforcement in that circuit. It seems clear to the Board that the court below once again requires correction by this court if the statute is to be effectively administered in the large and important area covered by that court's jurisdiction." (Pet. p. 22-23).

"These applications are being made because the Fifth Circuit has denied enforcement of, or modified, Board orders in an inordinately large number of cases which have recently been before that court on petitions for enforcement of Board orders, and because this experience bodes ill for the large number of Board cases now pending in the area over which the court below has jurisdiction." (Pet. p. 11).

The petition, discussing in some detail twelve Labor Board cases decided by the said Court of Appeals during the last two years, in which the Board's orders were set aside, modified, or remanded, then sets up a comparative chart of decisions in other Courts of Appeals as proof of its charges against the Judges of the court below. In eight of the twelve cases decided by the court below, no review was sought by the Board and there can be no purpose in bringing these cases for consideration before this Court except an improper one.

The statements in the petition for certiorari, in effect, charge the Judges of the Court of Appeals for the Fifth Circuit with a deliberate refusal to accept the requirements

of the statute involved in this and other labor cases decided by that court during the last two years, and therefore, an intentional failure to discharge their sworn judicial duties. It is not the function of the Labor Board to institute proceedings, either for the purpose of admonishing or rebuking the Judges of Federal Courts, or for the purpose of adjudicating as to the performance by Judges of their sworn duties. Certainly it is not within the function of the Labor Board to institute proceedings for the purpose of "softening up" the Judges of our Federal Courts. It is plain enough, moreover, that the Constitution does not confer jurisdiction on the Supreme Court for either of such purposes.

Under the Constitution of the United States, the function of impeachment of Judges is vested in the House of Representatives and the Senate of the United States.

B. CHARGES BASELESS IN SO FAR AS CONCERNS INSTANT CASE

In its statement of the facts involved in the present case the Board on many material points has grossly misrepresented and misstated the evidence to this Court.

Such misstatements have characterized every step in the Board's handling of the present case. The Trial Examiner, obviously prejudiced, based his recommended findings on carefully chosen, isolated phrases and sentences which were attributed meanings by the Examiner entirely contrary to the meaning of such testimony when considered as a whole. The Examiner likewise made his recommended findings by the convenient method of ignoring or discrediting such portions of the uncontradicted or unimpeached testimony of witnesses, which were contrary to his obvious scheme to find everything against the Respondent. The Board, with minor excep-

tions, swallowed the proposed findings hook, line and sinker, although detailed exceptions of Respondent carefully pointed out the obvious unfairness and error in the proposed findings. Nevertheless, in its petition for enforcement in the Court below, in its brief filed in the Court below, and in its argument in the Court below, the Board continued to adhere to such misstatements of the evidence. Finally, in its petition for certiorari in this Court the same carefully prepared misstatements are urged. Details of such misstatements are dealt with elsewhere in this brief, at page 9 et seq.

E. FAILURE OF BOARD TO NOTIFY RESPONDENT OF EXTENSION GRANTED FOR FILING PETITION FOR CERTIORARI IMPROPER

If for no other reason, the petition for certiorari should be dismissed for the reason that the Labor Board did not observe the spirit of the rules of this Court, nor recognized and customary ethics in its handling of the motion to this Court for an extension of time for filing the petition for certiorari. In connection therewith the following facts are pertinent:

(a) The petition for rehearing filed by the Board in the Court below was denied May 30, 1949; (Tr. p. 93)

(b) Without notice of any kind to Respondent or its counsel of record, before moving for an extension of time for filing petition for certiorari, the Board on August 26, 1949, four days before the expiration of time for filing petition for certiorari, obtained an order from the Chief Justice of this Court extending the time for filing petition for writ of certiorari to October 28, 1949; (Tr. p. 94)

(c) No notice of any kind was given Respondent or its counsel after the grant of and during the extension of time thus granted for filing petition for certiorari;

(d) The first indication which counsel for Respondent had of any application to this Court for the writ of certiorari was a newspaper item released by the Board and appearing in Atlanta newspapers early in November of this year in which the Board's castigation of the Court of Appeals for the Fifth circuit, through petitions for certiorari, was reported. No mention was made of specific cases in which this attack was made;

(e) The first notice to either Respondent or its counsel of the fact that the Board had obtained an extension of time for filing petition for certiorari was served upon Respondent's counsel on November 7, 1949, consisting of notice of filing of petition for certiorari and a transcript of record showing the extension granted August 26, 1949;

(f) The three month's period for applying for certiorari having expired on August 30, 1949, in so far as Respondent and its counsel were concerned, and no notice having been received of any extension of time, Respondent acted upon its counsel's request for compensation, upon the basis of a termination of the litigation.

F. INSTANT CASE INVOLVES NO QUESTION OF IMPORTANCE TO THE PUBLIC, AND STATEMENT OF THE CASE BY BOARD CONTAINS MANY MISSTATEMENTS ON MATERIAL POINTS

Respondent concurs with the Board in the following:

(a) That "no question of general importance in the administration of the Act is presented" by the present case (Pet. 18), and that this case in itself is not of sufficient importance to warrant an application for the writ of certiorari (Pet. p. 16);

(b) That the sole question before the Court below was

whether or not there was substantial evidence on the record considered as a whole to support the Board's findings.

The above admission by the petitioning Board should be sufficient for this Court to deny the writ.

However, inasmuch as the Board in its Statement of the Case herein has made so many misstatments of fact on material points, we believe it proper to point out such mistatements, lest this Court be misled.

The Charges:

This case involved two basic charges of alleged unfair-labor practices, namely:

I. That one employee, L. C. Kilgore, was discharged because of his union activities; (Tr. p. 11)

II. That the Respondent Company through named supervisory employees had: (1) Expressed its disapproval of the union; (2) Circulated and permitted circulation of an anti-union petition; (3) Urged, threatened, persuaded and warned employees not to assist, become or remain members of the union; (4) Interrogated employees concerning their union affiliations; (5) Made derogatory remarks to a union member in the presence of employees; and (6) Kept employees engaged in union activities under surveillance. (Tr. p. 11).

Findings:

The Trial Examiner in his recommended findings sustained the Board on both charges. (Tr. pp. 54, 62). The Board followed the Examiner's recommended findings as to the discharge of Kilgore (Tr. p. 34); and as to the alleged unfair activities of Foremen Camp, Elam, and Streetman; and the taking of an anti-union poll by employees. (Tr. pp. 54, 34, 35).

Items (1), (5), and (6) of Charge No. II were not sustained in the Board's findings. (Tr. pp. 35, 53, 54).

Board's Misstatements of Fact:

Misstatement No. 1—Of Own Finding: Under the caption "The Board's Findings and Conclusions" in its petition for certiorari the Board states:

> "* * * Assistant General Foreman Streetman, informed one of the Company's old employees, Wilson, that he, Streetman, two of the foremen, and Whitworth, a part-time supervisor, were not supposed to know about the Union's organizing campaign; that they would permit it to 'rock along until it got ripe, and then they would pluck it in the bud'; that they had 'squashed' it on a previous occasion when the Union had attempted to organize the plant and that 'they could squash it again.' " (Pet. p. 3).

The actual finding of the Board was not that Foreman Streetman made such a remark, but that a non-supervisory employee, Wilson, made the remark.

> "The undenied testimony relating to Employee Wilson's report to Streetman wherein Wilson naming Miles, Whitworth and Ragsdale said 'they' were not supposed to know that a union was being organized but that when the time was ripe 'they' would 'squash' it * * *." (Tr. p. 53).

Misstatement No. 2—Of own Finding: Under the same caption in its brief the Board states:

> "Whitworth was one of the persons mentioned by Assistant General Foreman Streetman as having been responsible for defeating the Union when it attempted to organize the plant upon a previous occasion and who could do it again." Pet. p. 6).

As pointed out above, the Board's own finding was that the

statement as to a previous union organizing effort at the Respondent's plant was made by a non-supervisory employee, Wilson, and not by Foreman Streetman. (Tr. p. 53).

Misstatement No. 3—Of Own Finding: Under the same caption in its petition the Board, in an effort to paint a finding of open company hostility toward the union, refers to a statement by Foreman Miles to an employee as to Miles' personal opinion as to the union, as follows:

> "When Holcombe expressed himself in favor of unionization, Miles announced that 'he didn't want the damn CIO in there' and that 'the day it came in was the day he would leave.' " (Pet. p. 5).

The Board itself, however, found that this was legitimate comment.

> "We are unable to agree with the Trial Examiner that the statement of Foreman Miles to employee Holcombe that he (Miles) 'didn't want the damn CIO in there,' and that 'the day it came in was the day he was leaving,' went beyond legitimate comment by a supervisor. We believe that the above statement was nothing more than an opinion expressed by Miles as to what he, Miles, would do if the Union came into the plant." (Tr. p. 35).

In spite of this, the Board quotes Miles' comment for the obviously unfair purpose of misleading this Court.

Misstatement No. 4—Of Own Finding: Under this same caption in its petition the Board states:

> "Prior to being put in charge of the vault department, Whitworth had made several inquiries concerning whether certain employees were union members, had attended a union meeting, and had thereafter circulated one of the anti-union petitions." (Pet. p. 6).

The Board found that at the time of these activities by Whitworth he was a non-supervisory employee. (Tr. pp. 34, 35).

We believe that the Board's comment to this Court on such activities of Whitworth, without stating that they occurred while Whitworth was a non-supervisory employee, was a deliberate effort to mislead.

Misstatement No. 5—Of Evidence: Bearing on the discharge of Kilgore, the Board asserts in its petition:

> "At the hearing, no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged. Even Whitworth did not so testify, but contended rather that Kilgore was discharged because he did not perform his work properly." (Pet. p. 8).

This statement by the Board is pure fabrication, inasmuch as the evidence was uncontradicted that Kilgore did not like his job; that employees working with him on a four-man team job (fitting metal plates into a break) complained to Kilgore and to Foreman Whitworth that Kilgore would not do his part of the job; that one of the team (Dowda) on whom the weight of the metal was shifted as a result of Kilgore's failure to do his share of the work, threatened to quit; that Kilgore was shown by Whitworth how to do his part of the work, but still failed to do so, and then invited Foreman Whitworth to fire him. (A. 72-75; 80-84; 102-107; 21; 22; 27).

Misstatement No. 6—Of Evidence: Bearing upon the employee-instituted and conducted poll, the Board states:

> "By the early part of February, after the union had achieved substantial success in its organizing campaign, the Company commenced its efforts to eliminate the Union as it had threatened to do. Anti-union petitions appeared almost simultaneously in all departments of the plant,

most of them typed on the Company's old time sheets." (Pet. p. 3, 4).

The uncontradicted and unimpeached evidence as to the employee-inspired and conducted poll was as follows:

John H. Wilson, a nonsupervisory employee of Respondent for nineteen years, heard talk that the CIO was trying to organize the workers. (A. 53). Some of the men working for the union said that the union was coming in, and that if employees didn't sign up that they would be out of their jobs when the union did come in. (A. 54). Consequently, Wilson, who thought that a majority of the employees didn't want a union, conceived the idea of a poll by employees to determine those employees against the union so as to discourage the union workers. Wilson testified in this connection:

> "Well, I wrote this right at the top: 'We, the undersigned, do not want a Union,' and I started it off myself and started down the line with it in our department. And then there was some of the other departments heard that—what we was doing, and they wanted—they wanted us to come in their departments and to get the list, and I told them to start with that I wasn't fooling with nobody's department but ours, because they said all the trouble was in our department, and I just wanted to show how many in our department did not want the Union. And another thing, there was some boys in our department told me, and told some of the rest, they was talking around, that they didn't know what to do; they didn't want a Union but some of these fellows working for the Union told them that the Union was coming in there and if they didn't sign up that they—when the Union come in there, they'd be blackballed. That's what they told me—they'd been—they'd be out of a job. And then, they didn't know what to do."
>
> * * * *
>
> "I knew that the majority didn't want the Union, or

I thought they didn't, and I started this to—well, I told them, I said, 'Now, this is among ourselves and all this is for is to let these fellows that's working for the Union know how many don't want the Union and maybe it'll discourage them before it comes to a vote, because if it comes—if they get enough cards signed to come to a vote, there's some of the crowd in here that don't know what to do, and they're liable—they don't know which they—which way they liable to vote.' " (A. 54).

Wilson testified that Mr. Cannon, President of Respondent, was not told about the poll, (A. 54); that, the poll was taken in the several departments, as follows: in his own department, and three other departments by him and employee Emmett Kemp (A. 54 thru 56); in another department by Henry Whitworth, (A. 55); in still another by Kemp and employee Wilkie (A. 56); in another by Kemp, his brother and employee Wilkie (A. 56); in the sewing room, the poll was simply taken and handed to Wilson (A. 57); among the colored folks the first name on the list handled the poll (A. 57).

Wilson estimated that approximately 175 employees signed the poll indicating they did not want the CIO union or a union. (A. 59). Actually, a count of the signatures on the several scraps of paper on which the poll was taken shows a total of 185 employees against the CIO or a union. (Resp. Ex. 1.) Inasmuch as 175 constituted more than a majority, (A. 68), it appeared that far more than a majority of the employees were opposed to any Union coming in. Employees were told by Wilson that the poll was to get everybody who didn't want a union to sign the poll, to discourage the men working for the Union (A. 58). Wilson did not inform Foremen Elam or Camp about the poll (A. 60). Foreman Streetman asked him about the list and wanted to know what it was, and Wilson "just kind of passed it off." (A. 61). Wilson never showed the list to Respondent's President, Cannon (A. 62), and never

took it to the office of Respondent until an investigator from the Labor Board came to Respondent's office, at which time Wilson showed the poll lists to this investigator. (A. 62). Wilson produced the poll lists at the hearing before the Board.

Wilson testified that in one department (spray room) where some 15 or 20 employees worked, they wouldn't sign the poll unless President Cannon "put something on it. If it said Mr. Cannon would head that with something on there, well, they'd sign it." Wilson replied:

> " . . . I told them Mr. Cannon wasn't having a thing to do with that—we was doing that within ourselves—and I didn't think that he knew anything about it, and so they didn't sign the list at all, but they said they didn't want the Union." (A. 69).

Actually, Cannon was out of town during this time. (A. 69).

CONCLUSION

For the reasons stated herein, it is respectfully urged that the writ be denied.

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Of Counsel

1045 Hurt Building, Atlanta, Georgia

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 431

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ATLANTA METALLIC CASKET COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM IN BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

This memorandum is filed in response to that part of respondent's opposition to the petition for a writ of certiorari which charges the Board with making misstatements in its petition.

1. Under the headings "Misstatement No. 1" and "Misstatement No. 2" (Opp. pp. 9–10) respondent challenges the accuracy of that part of the Board's petition (pp. 3, 6) which concerns a conversation between Assistant General Foreman Streetman and employee Johnnie Wilson. Respondent accuses the Board of attributing certain anti-union remarks to the foreman instead of to employee Wilson. The petition placed respon-

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sibility for the remarks on the foreman, in reliance upon the following finding set forth in the intermediate report adopted by the Board (R. 45):

> L. C. Kilgore testified that on or about January 1, 1946, he overheard a conversation between H. D. Streetman, the assistant to the general foreman of the Respondent's sheet metal department and Employee Johnnie Wilson. Kilgore testified as follows:
>
> > H. D. Streetman, and Johnnie Wilson came by within four feet of where I was working, turned up a little alley there. Streetman told Johnnie, says, "Paul Miles and Henry Whitworth and a fellow by the name of Ragsdale and Whitworth and Streetman," he said they wasn't supposed to know anything about they was trying to organize there, and that they had tried to organize once before and they would let it rock along until it got ripe, and then they'd pluck it in the bud. They's squashed it one time, and they could squash it again.
>
> Streetman was not called to testify. Wilson in his testimony did not deny the above related incident. The undersigned credits Kilgore.

It is undisputed that Paul Miles and Ragsdale, referred to in this conversation, were foremen (B. A. 16). The Board's finding quoted above is, we submit, accurately summarized in the peti-

tion for a writ of certiorari as follows (Pet. p. 3):

> About January 1, 1946, while United Steel Workers of America, CIO, herein called the Union, was engaged in an attempt to organize the Company's employees, Assistant General Foreman Streetman informed one of the Company's old employees, Wilson, that he, Streetman, two of the foremen, and Whitworth, a part-time supervisor, were not supposed to know about the Union's organizing campaign; that they would permit it to "rock along until it got ripe, and then they would pluck it in the bud"; that they had "squashed" it on a previous occasion when the Union had attempted to organize the plant and that "they could squash it again" (R. 42, 45; B. A. 15–16).

Respondent, in challenging the accuracy of the statement in the petition for certiorari of the Board's finding, recites other language in the intermediate report, which because the intermediate report was adopted by the Board, must be also regarded as the Board's language. The language relied upon by respondent is merely a reference to the finding already made. In this reference to the finding (R. 53), the intermediate report inadvertently refers to the statement in question as if the employee rather than the assistant general foreman made it. Thus, the intermediate report states: "The undenied testimony

relating to Employee Wilson's report to Streetman wherein Wilson naming Miles, Whitworth and Ragsdale said 'they' were not supposed to know that a union was being organized but that when the time was ripe 'they' would 'squash' it * * * shows the Respondent's knowledge and attitude in the Union affairs of its employees."

This inaccurate reference to the finding which appeared earlier in the intermediate report does not, we submit, nullify or change the finding; nor does it affect the propriety of the Board's conclusion that the statement "shows the Respondent's knowledge and attitude in the Union affairs of its employees" (R. 53) since, one of the parties to the conversation being the Assistant General Foreman, the statement by whomever made, implicated respondent's Foremen Miles and Ragsdale and its Assistant General Foreman Streetman in the scheme to "squash" the Union. The Board's finding in regard to the conversation in question was summarized in the petition for a writ of certiorari merely to show, in accordance with the Board's conclusion, the respondent's knowledge and attitude in the Union affairs of its employees.

2. The alleged misstatement of the Board's finding labelled by respondent as "Misstatement No. 3" consists of a sentence taken out of context from the petition and asserted by respondent to be used "for the obvious unfair purpose of mis-

leading the Court" (Opp. p. 10). The sentence in question is a part of the recital of the circumstances or setting in which respondent's foreman, Miles, questioned an employee, Holcombe, in regard to his union sympathies (Pet. p. 5). The foreman's expression of hostility toward the Union at the time of the questioning was found by the Board not to be unlawful (R. 35) but the questioning was found to be unlawful (R. 51, 53–54). While the sentence in question was probably susceptible of the construction put upon it by respondent, there was obviously no purpose to mislead. For, our petition (p. 9) did in fact indicate what conduct of respondent the Board found violative of the Act when we stated the Board's conclusion that the conduct of Foreman Miles in questioning employee Holcombe about his position in regard to the Union was violative of Section 8 (1) of the Act and did not, in our statement of the Board's conclusions, mention any other conduct of Foreman Miles.

3. Analysis shows that the remaining matters to which respondent objects, although labelled "Misstatements" No. 4, 5, and 6 (Opp. pp. 10–14), are, on the face of respondent's opposition, not actually misstatements either of the Board's findings or of the evidence.

Thus, in connection with the alleged "Misstatement No. 4—Of Own Findings," respondent has taken a sentence in the petition out of its context and asserted that it is an attempt to mislead this

Court into believing that Whitworth was a supervisor at the time he engaged in certain conduct (Opp. pp. 10–11). Aside from the fact that the sentence, by itself, is not misleading, since it commences with the phrase, "Prior to being put in charge of the vault department," a prior sentence of the same paragraph of the Board's petition specifically explains the exact date and circumstances under which Whitworth was put in charge of the vault department and thus became a supervisory employee (Pet. p. 6).

Again, in connection with the alleged "Misstatement No. 5—Of Evidence," respondent takes two sentences in the Board's petition out of their context in the paragraph in which they appear, in order to argue that the Board has misstated or failed to fairly state the evidence (Opp. p. 11). In that paragraph, and preceding the sentences attacked, there is set forth a summary of the occurrences on the day Kilgore was discharged, including the fact that on that day Acting Foreman "Whitworth called Kilgore aside and told him that the men with whom he worked were going to quit if Kilgore did not quit"; then, after a recital of Kilgore's reply and other occurrences on that day (Pet. 7–9), there appear the following statements, including the sentences under attack (Pet. pp. 8–9):

> He [Whitworth] reported to the general foreman, "Kilgore here, I don't know what the trouble is. He's always been on time,

> his work's been satisfactory up to today. Those three men on the * * * big break, has—says they're going to quit if he don't" (R. 56; B. A. 23). Kilgore was then discharged (R. 56–57; B. A. 23). At the hearing, no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged (R. 61). Even Whitworth did not so testify, but contended rather that Kilgore was discharged because he did not perform his work properly (R. 60–61; B. A. 93–94).

When the petition stated that "no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged," it was referring to the employees with whom Kilgore was working on the day of his discharge ("Those three men on the * * * big break", see Whitworth's report, quoted above) and we think this is clear when the challenged statements are read in their context.

The statements as thus read in their context are correct and proper and none of what respondent asserts to be the evidence is inconsistent with them. Respondent asserts, to prove its point, that there is evidence "that one of the team (Dowda) on whom the weight of the metal was shifted as a result of Kilgore's failure to do his share of the work, threatened to quit." Employee Dowda, however, was not one of the team with whom Kilgore was working on the day of his discharge (R. 56; B. A. 26–27). Although

at one time he had worked on the "break" with Kilgore, he had been transferred from that job to another job a week prior to Kilgore's discharge (R. 57; B. A. 67, 68, 72). Whitworth could not have had reference to this early alleged complaint by Dowda for, as indicated in the quotation above, Whitworth said that Kilgore's "work's been satisfactory up to today."

Likewise, in connection with the alleged "Misstatement No. 6—Of Evidence," (Opp. pp. 11–14), respondent does not show that the Board misstated any evidence in its petition. Respondent, instead, merely recites other evidence which either has no bearing upon the Board's finding under attack or which, at the most, could relate only to the weight of the evidence. See Pet. 3–5.

Respectfully submitted.

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JANUARY 1950.

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